OHIOEDISON

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May 20, 1996



William F. Caton
Acting Secretary
Office of the Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

**Re: Docket No. 96-98**

Dear Mr. Caton:

Enclosed for filing are the original and sixteen (16) copies of the Reply Comments of Ohio Edison Company on the Commission's April 19, 1996 Notice of Proposed Rulemaking. These comments specifically address Access to Rights-of-Way.

If you have any questions concerning this filing, please call me at the number below.

Sincerely,

Linda R. Evers

Linda R. Evers
Attorney
330-384-3864

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Enclosures (17)

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**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| In re Matter of | ) | |
| Implementation of the Local | ) | |
| Competition Provisions in | ) | CC Docket No. 96-98 |
| the Telecommunications Act | ) | |
| of 1996 | ) | |

# REPLY COMMENTS OF OHIO EDISON COMPANY

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Dated June 3, 1996

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## SUMMARY

For the reasons fully described below, Ohio Edison requests that the Commission:

- Avoid adopting substantive rules. Detailed regulations are unnecessary at this time.
- Adopt a reasonable interpretation of what constitutes a right-of-way.
- Allow facility owners to reserve capacity for its future needs.
- Not require expansion solely to accommodate attaching entities.
- Customer service standards should be considered when adopting notice requirements.
- Allow utilities to adopt safety standards that are more stringent than national codes as long as they are applied in a nondiscriminatory manner.

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| of 1996 | ) | |

**REPLY COMMENTS OF OHIO EDISON COMPANY**

Ohio Edison Company ("Ohio Edison"), appreciates the opportunity to provide reply comments to the Federal Communications Commission's ("Commission") Notice of Proposed Rulemaking (the "NOPR") in the above-captioned docket adopted April 19, 1996. The NOPR inter alia requested comments regarding the implementation of Section 224(f) and (h) of the Communications Act of 1934, as amended (the "1934 Act"), which were added by Section 703 of the Telecommunications Act of 1996 (the "1996 Act"). A description of Ohio Edison's statement of interest in this matter was included in its Comments filed May 20, 1996.

Communications with respect to these reply comments should be addressed to:

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## I. SUMMARY OF OHIO EDISON'S INITIAL POSITION

Before the Commission is the question of "nondiscriminatory" access to utility poles, ducts, conduits, and rights-of-way by telecommunications providers. In its initial Comments, Ohio Edison urged the Commission to proceed cautiously in enacting substantive regulations affecting the electric power industry until it has sufficient experience and expertise to understand the impact that its rules might have on the industry.

Ohio Edison brought to the Commission's attention the diverse factual situations which would be difficult, if not impossible for the Commission to anticipate and resolve by general rule. Ohio Edison urged the Commission to resolve by adjudication any situations which the parties were unable to resolve through negotiation.

In the event that the Commission were to elect to adopt detailed rules, Ohio Edison made a number of

recommendations in response to the Commission's specific questions in the NOPR. First, Ohio Edison agreed that it would be inappropriate for a utility telecommunications affiliate to have preferred access rights or more advantageous terms than a third-party telecommunications carrier. However, these fair-competition concerns between the telecommunication providers do not justify any restriction on the electric utility owner's property rights in carrying out its business purposes. Moreover, third-party attachments present significant engineering, safety, and business issues that are not present with regard to the utility's use of its own facility.

Second, Ohio Edison urged the Commission to consider that attachment issues are not only subject to its jurisdiction, but are also governed by state and local health, safety and zoning regulations. Any third-party right of access must be specifically subject to compliance with these regulations. In addition, if the utility is not a fee simple owner but an easement-grantee of a right of way, it could not grant a telecommunications company access if the easement concerned does not permit it to do so, regardless of whether the Commission has adopted a rule to the contrary.

Third, Ohio Edison agreed that national codes (such as the National Electrical Safety Code) can generally form the technical basis for capacity, safety, reliability, and engineering determinations. However, a one-size-fits-all approach of determinative factors would not be practical because of the various factual situations that would arise. Moreover, utilities must be able to reserve reasonable capacity on their facilities for reliability and future expansion.

Fourth, Ohio Edison recommended that the Commission defer the question of notice requirements to the agreement of the parties or local coordination practices (e.g., municipal utility councils). If the Commission establishes minimum criteria, ten-day notice by first class mail would be appropriate. Emergency modifications, routine maintenance, and new construction should be excepted from notice requirements. In addition, the Commission should adopt a two-year grace period with respect to notice requirements because many utilities have no valid attachment database.

Fifth, Ohio Edison strongly opposes any mandate that would require make-ready costs (paid under Section 224(h) of the 1996 Act by attaching entities which elect to take

advantage of an opportunity to modify or add to their attachments) be offset by potential revenue which the facility owner might realize from additional attachments. Such a mandate would modify the carefully crafted compensation plan enacted by Congress. Moreover, offsetting actual make-ready expenses incurred by the facility owner with potential future revenue increases would be manifestly unjust and would result in utility customers subsidizing telecommunications carriers. Additionally, Ohio Edison recommended that the "proportionate share" of such make-ready costs should be calculated by dividing the total costs by the number of entities (including the utility, if applicable) which elect to add to or modify their attachments.

Finally, Ohio Edison strongly opposes a rule which would limit a facility owner's right to modify its own facility. Natural market forces prevent any abuse that a Commission rule would seek to remedy.

## II. A BROAD CROSS-SECTION OF COMMENTERS SUPPORT OHIO EDISON'S POSITION THAT DETAILED REGULATIONS ARE UNNECESSARY

A large number of organizations representing diverse viewpoints filed comments discussing pole attachments.

Broadly categorized, these commenters fell into one of several categories: (1) National interexchange carriers (IXCs); (2) local exchange carriers (LECs); (3) governmental bodies; (4) competitive access providers (CAPs) and cable television companies (CATV); and (5) electric utilities. Not surprisingly, competitive access providers and cable television companies took the most militant positions on access to utility infrastructure. Ohio Edison takes issue with many of the positions espoused by these telecommunications companies. Specific comments and Ohio Edison responses will be presented in Part III below.

The Commission should note that a large number of commenters, including one IXC and CAP company, were in agreement with Ohio Edison's recommendation that the Commission take a cautious approach to adopting substantive rules. Frontier Corporation indicates that the terms of Section 224(f)(2) are relatively self-explanatory, recommending only that the Commission ensure that the utility's reasons be keyed to its electric service business.[1] Sprint recommends that (i) insufficient

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[1] Comments of Frontier Corporation at 7 (CC Docket No. 96-98 May 20, 1996) ("Frontier Comments").

capacity claims be examined on a case-by-case basis, (ii) no specific standards governing safety and reliability be adopted and (iii) the Commission delay all cost allocation rules until it gains more experience over the next few years.[2] A coalition of rural telephone companies recommends that the Commission adopt no detailed rules regarding denial of access to poles, conduits, and rights-of-way. Many regional Bell Operating Companies and electric utility commenters recommend that the Commission not adopt specific rules at this early stage.[4]

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[2] Comments of Sprint Corporation at 16-18 (CC Docket No. 96-98 May 20, 1996) ("Sprint Comments").

[3] Comments of the Western Alliance on Dialing Parity and Access to Poles, Conduits, and Rights of Way at 4 (CC Docket No. 96-98 May 20, 1996).

[4] See, e.g., BellSouth Comments at 13-14 (CC Docket No. 96-98 May 20, 1996); Comments of U S West, Inc. at 15 (CC Docket No. 96-98 May 20, 1996); Comments of SBC Communications, Inc. at 14-15 (CC Docket No. 96-98 May 20, 1996); Comments of GTE Service Corporation at 22 (CC Docket No. 96-98 May 20, 1996); Further Comments of Bell Atlantic at 14 (CC Docket No. 96-98 May 20, 1996); Comments of Pacific Telesis Group at 17 (CC Docket No. 96-98 May 20, 1996); Comments of Delmarva Power & Light Company at 3 (CC Docket No. 96-98 May 20, 1996); Joint Comments of UTC and The Edison Electric Institute (passim) (CC Docket No. 96-98 May 20, 1996); Comments of Ohio Edison Company at 4-8 (CC Docket No. 96-98 May 20, 1996); Comments of Duquesne Light Company at 3 (CC Docket No. 96-98 May 20, 1996); Comments of Virginia Electric and Power Company at 4-6 (CC Docket No. 96-98); Comments of American Electric Power Service Corporation et al. at 19 (CC Docket No. 96-98 May 20, 1996); Comments of the People of California et al. at 6 (CC Docket No. 96-98 May 20, 1996) (recommending that the FCC defer rulemaking on Section 224(f) and (h) to deal with all pole attachment issues comprehensively).

The entire thrust of the 1996 Act is less regulation, not more regulation -- a concept which Section 224 recognizes in its explicit preference for negotiated, rather than regulatory, pole attachment solutions.[5] The Commission should follow the advice of the electric power industry and other thoughtful commenters and adjudicate access issues until it has the knowledge and experience to adopt regulations that make sense for both the electric and telecommunications industries.

## III. RESPONSES TO SPECIFIC COMMENTS

### A. The Commission Should Adopt a Reasonable Interpretation of What Constitutes a "Right-of-Way"

A number of commenters urge the Commission to take an expansive view of what constitutes a "right-of-way." Typical among these are pleas for the Commission to include LEC building access points, risers and lateral conduits in multi-unit premises, telephone vaults and closets, and so forth.[6] Ohio Edison interprets these

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[5] See 1934 Act § 224(e).

[6] See, e.g., Comments of GST Telecom, Inc. at 1 (CC Docket No. 96-98 May 20, 1996) ("GST Comments"); Additional Comments of MFS Communications Company, Inc. at 9 (CC Docket No. 96-98 May 20, 1996) ("MFS Comments"); Comments of AT&T Corp. at 14 (CC Docket No. 96-98 May 20, 1996) ("AT&T Comments").

comments to refer specifically to pathways utilized by local exchange carriers, and, as such, takes no position as to whether the Commission should include them within the definition of "rights-of-way." Ohio Edison notes that, in general, electric meters are located on the exterior of buildings (even on the exterior of most multiunit buildings). Ownership and control of electric wiring on the customer's side of the meter belongs to the customer and not to the electric company. In most instances the electric utility neither owns nor controls the cable entranceway into buildings. Certainly the expansive definition of "rights-of-way" urged by certain commenters would be factually incorrect in referring to electric utility infrastructure.

In a unique comment, Winstar insists that the term "rights-of-way" includes the right to install microwave towers, with one or more antenna dishes ("each of which is approximately the size of a medium pizza") on the roofs of buildings.[7] In fairness to Winstar, it primarily bases this assertion on the provisions of the 1934 Act § 251(c)(6) rather than on the pole attachment

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[7] Comments of Winstar Communications, Inc. at 4-5 (CC Docket No. 96-98 May 20, 1996) ("Winstar Comments").

provisions of § 224(f).[8] To the extent that Winstar bases its assertion on Section 251(c)(6), Ohio Edison takes no position. However, at one point in its comments, Winstar also seems to root its rooftop claim on Section 224(f)(1).[9] Ohio Edison takes vigorous exception to this claim. The term "right-of-way" in electric utility usage is quite specific as referring to a specific pathway, often by grant of easement over the property owned in fee by others, for specific transmission and distribution conductors. It most certainly does not include any utility buildings or power plants. Neither Section 224 nor its legislative history would suggest that Congress intended that the term "right-of-way" to be any more inclusive than its usual usage. But if the Commission were to adopt Winstar's position regarding rooftop access, it should reject Section 224(f)(1) as the legal basis for that decision and explicitly indicate that such access is solely predicated on the provisions of Section 251(c)(6).

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[8] Id. at 4.

[9] Id. at 5.

**B. The Final Order Should Be Consistent With Property Law and State and Local Jurisdiction**

In its Comments, Ohio Edison pointed out that many rights-of-way are used by utilities under restrictive easements which may not permit the utility to grant third-party access, and that various State statutes and local ordinances lawfully regulate the placement and use of poles, ducts, conduits, and rights-of-way. A number of the telecommunications commenters insist that the 1996 Act provides the Commission unlimited authority to order attachments on both public and private property.[10] Significantly, none of the carriers insisting on broad, mandated access addresses the applicability of property law or State statutes or local ordinances.

With respect to the applicability of general property law, the Fifth Amendment takings clause certainly constitutes the upper limit of Commission jurisdiction. The takings implications of the 1996 Act were discussed

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[10] See, e.g., Comments of NEXTLINK Communications, L.L.C. at 4-5 (CC Docket No. 96-98) (stating 1996 Act creates a "fundamental right" of access to "public and private properties") ("NEXTLINK Comments"); Comments of General Communication, Inc. at 3 (CC Docket No. 96-98) ("GCI Comments").

in great detail by some commenters.[11] Ohio Edison endorses those comments and requests the Commission to carefully consider the extent to which its authority under Section 224(f)(1) is circumscribed by the Fifth Amendment.

None of the telecommunications commenters addressed the effect of State statutes and regulations or of local zoning ordinances on the Commission's authority to order access to utility poles. No commenter set forth an argument that Section 224 provides the Commission authority to preempt such State and local laws. Indeed, Section 704 of the 1996 Act adds Section 332(c)(7) to the 1934 Act, entitled "Preservation of Local Zoning Authority," permits preemption of such authority for the siting of wireless antennae only with respect to the environmental effects of radiofrequency emissions.[12] Moreover, the 1996 Act specifically affirms the authority of State and local governments to regulate access to public rights-of-way and to charge

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[11] See, e.g., Infrastructure Owners' Comments at 7-10.

[12] See 1996 Act § 704(a) (adding § 332(c)(7)(B)(iv) to the 1934 Act).

reasonable and nondiscriminatory fees for their use.[13] The Commission should be mindful of State and local regulatory authority in its final rule.

### C. Electric Utilities Must Be Permitted To Reserve Capacity For Reliability and Future Expansion, and Cannot Be Forced to Expand Facilities Solely to Accommodate Telecommunications Attachments

A number of telecommunications carriers advocate a final rule prohibiting electric utilities from reserving capacity on its facilities for reliability purposes or future expansion of its electric service,[14] or propose significant limitations on a utility's ability to do so.[15]

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[13] See 1996 Act § 101(a) (adding § 253(c) to the 1934 Act) and § 704(c).

[14] See, e.g., NEXTLINK Comments at 5-6; Comments of American Communications Services, Inc. at 8 (CC Docket No. 96-98 May 20, 1996) ("ACSI Comments").

[15] See, e.g., Second Round Comments of the Association for Local Telecommunications Services at 8 (CC Docket No. 96-98 May 20, 1996) (urging that capacity reservations be permissible only if "presented to and approved by the relevant state authority"); GST Comments at 5-6 (utilities should be permitted to reserve space on facilities only if "they provide the same opportunity for future expansion to all other future users of the facility on a nondiscriminatory basis"); MFS Comments at 10-11 (same); AT&T Comments at 16 (urging prohibition of reservation of capacity except for near term -- one year or less -- requirements); Comments of MCI Telecommunications Corporation at 23 (CC Docket No. 96-98 May 20, 1996) ("MCI Comments") (urging disallowance of any capacity reservation unless the utility had "specific plans to utilize that space before the interconnecter requested access").

The Commission should reject these views. The Commission must recognize that utilities justifiably relied upon the regulatory system dealing with pole attachments in effect for the past seventeen years in planning the distribution systems that currently exist. Under the pole attachment regulatory scheme enacted in 1978, electric utilities had the absolute right to bar all attachment to all or part of their infrastructure.[16] Thus, electric utilities were secure in the knowledge that they could retain sufficient reserve capacity for reliability and future expansion. Accordingly, electric utilities designed their infrastructure capacity to meet their own needs; capacity for attachments would be provided only to the extent that the standard size of the facility had more capacity than was needed for the utility's needs.[17]

Under the scenario advocated by many telecommunications carriers, this reserve capacity could be quickly

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[16] See FCC v. Florida Power Corp., 480 U.S. 245, 251-52 (1987) (holding Section 224 "provides no explicit authority to the FCC to require pole access for cable operators").

[17] For instance, even if a utility needed only five feet of capacity on a given pole run, it might nevertheless have to install 35-foot distribution poles due to minimum safety requirements, thus providing several feet of excess capacity for use by attaching entities.

appropriated by telecommunications carriers. Then, when the forecast future electrical load requirements materialize, the electric utility and its customers would be forced to invest in additional infrastructure to serve that additional load. If the facilities concerned are underground ducts or conduit, this capital expense (which will be borne at replacement costs rather than embedded costs) will be especially burdensome. If the outside plant involved consists of poles rather than underground conduit, Section 224(i) could add insult to injury if it were to be interpreted as requiring the utility also to bear the cost of transferring telecommunications attachments from the old poles to the new poles, despite the fact that the presence of telecommunications attachments in fact caused the need for taller poles in the first instance.

Closely related to the capacity reservation issue is the assertion by several telecommunications commenters that the 1996 Act requires utilities to expand their facilities if existing infrastructure capacity is insufficient to serve the needs of all.[18] In this

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[18] See, e.g., NEXTLINK Comments at 6 (FCC should required expansion of facilities and "sharing" of the associated costs).

instance, as AT&T properly notes, the Act may distinguish between incumbent LECs (to which Section 224(f)(2) does not apply) and electric utilities (to which Section 224(f)(2) does apply).[19] Ohio Edison takes no position as to whether the Act requires incumbent LECs to expand their facilities to accommodate competing telecommunications carriers. However, Ohio Edison agrees with AT&T's analysis that the 1996 Act most certainly does not require electric utilities to expand their facilities to accommodate telecommunications attachments. To hold otherwise would directly contradict the clear and unambiguous language of Section 224(f)(2) that an electric utility "may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights of way, on a nondiscriminatory basis where there is insufficient capacity . . . ."

The Commission should not promote the unjust results that would flow from accepting the arguments made by telecommunications carriers that utilities should not be permitted to reserve capacity on their own facilities or that they must construct additional

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[19] See AT&T Comments at 16.

facilities solely to accommodate telecommunications attachments. If the Commission rule were to require either action, it would effect an unequivocal and unjust subsidization of the telecommunications industry by utility customers (if state commissions permit the recovery of such costs in electric rates) or utility shareholders (if they do not).

### D. The Principle of Nondiscrimination Does Not Require Electric Utilities and Telecommunications Carriers To Be Subject To Identical Attachment Terms and Conditions

A large number of commenters state that nondiscriminatory access means that both pole owners and their affiliates should be subject to the same attachment terms and conditions as third party telecommunications carriers.[20] As Ohio Edison stated in its initial Comments, Ohio Edison is in full agreement that nondiscrimination principles require comparable attachment terms and conditions for telecommunications affiliates of electric utilities if

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[20] See, e.g., GCI Comments at 3; Comments of Telecommunications Resellers Association at 13 (CC Docket No. 96-98); Comments on Pole Attachment Issues at 18 (CC Docket No. 96-98) ("Joint CATV Comments); Comments of Citizens Utilities Company at 3 (CC Docket No. 96-98 May 20, 1996); Second Initial Comments of Time Warner Communications Holdings, Inc. at 13 (CC Docket No. 96-98 May 20, 1996) ("Time Warner Comments"); ACSI Comments at 7; MCI Comments at 21; Sprint Comments at 16.

they offer telecommunications directly or indirectly to the public. In fairness, Ohio Edison notes that most commenters addressed the argument for parity with the pole owner in the context of an incumbent LEC rather than in the context of an electric utility. Ohio Edison recognizes that the Commission may determine that establishment of a level playing field for all competing local exchange carriers may require close scrutiny with respect to the parity of terms and conditions of access to LEC facilities and imputation of equivalent pole attachment rates in local exchange telephone rates. Ohio Edison takes no position on the issue of nondiscrimination as it relates to terms and conditions applied to LEC pole owners and competing telecommunications carriers. However, the Commission should recognize that no competitive concerns would justify requiring an electric utility pole-owner to apply the same terms to itself as it does to third-party telecommunications carriers. So long as the electric utility does not unreasonably discriminate with respect to terms and conditions among similarly-situated telecommunications carriers,[21] the

[21] Even among telecommunications carriers, there may be valid factual reasons to require different terms and conditions. For instance, attachment of a 900-pound wireless antenna array

nondiscrimination principles enacted in Section 224(f)(1) are satisfied.

### E. Any Notice Requirements Must Accommodate Reasonable Customer Service Standards

Several telecommunications carriers request that the Commission adopt notification standards under Section 224(h) that would significantly impede an electric utility from reasonably conducting its electric utility business. For instance, some carriers demand the Commission establish minimum notification periods between sixty days and twelve months.[22] Other carriers suggest that "reasonable notice" be defined as notice which allows a carrier to prevent disruption of its network without undue financial burden.[23] Time Warner insists that the utility must not only provide notice,

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presents different operational and potential liability problems, requiring greater contractual protection of the pole owner and the public, than attachment of a simple single coaxial cable television cable.

[22] See, e.g., Comments of Teleport Communications Group, Inc. at 22 (CC Docket No. 96-98 May 20, 1996) ("no less than twelve months") ("TCG Comments"); GCI Comments at 4 ("at least 6 months"); GST Comments at 7 (60 days); MFS Comments at 11-12 (90 days); Joint CATV Comments at 20 (60-90 days); Time Warner Comments at 15 (90 days).

[23] See GST Comments at 7; Winstar Comments at 7-8.

but provide notice to a specific individual within its organization.[24]

Adoption of these various suggestions would unjustifiably infringe on the electric utility's right to conduct its own business. Any notice period that the Commission might adopt would impose at least that much delay in the process of providing electrical service to new customers. Neither customers nor state commissions would tolerate built-in delays of two, three, six or twelve months between a service order and completion.[25] Moreover, when facilities must be moved to accommodate public improvements (e.g., widening a street), the utility may itself have less than two months notice. Imposing a definition as suggested by GST and Winstar -- that notice be considered reasonable only if the telecommunications carrier can avoid network disruption without "undue" cost -- would make the electric utility a hostage to the telecommunications carrier's network engineering. Time Warner's suggestion that the utility be subject to a

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[24] Time Warner Comments at 15.

[25] Indeed, wireless telecommunications carriers during their initial buildout will frequently submit new electric service applications for cell sites and expect that service to be available within a fortnight (or less).

legal requirement to maintain a current accurate organization chart of all attaching entities is clearly overreaching.

Frontier Communications offers cogent advice regarding notice: Notification is not currently a problem, so do not make it become a problem by enacting strict notice rules -- "permit affected parties to negotiate the terms of notice in their occupancy agreements, subject only to the requirement that all users be notified at the same time."[26] This makes sense and is a workable solution. The Commission can resolve any disputes that may arise using its complaint process.

### F. Utilities Should Be Permitted to Adopt Safety and Engineering Standards That Are More Stringent Than National Codes, Provided That Such Standards Are Applied in a Nondiscriminatory Manner

Several commenters suggest that safety standards adopted by individual companies that are more stringent than national engineering standards (such as the National Electrical Safety Code) should be deemed per se unreasonable.[27] Ohio Edison agrees that national

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[26] Frontier Comments at 7.

[27] See, e.g., GST Comments at 6; MFS Comments at 11; Joint CATV Comments at 17-18; Time Warner Comments at 14; ACSI Comments at 8.